STATE OF MICHIGAN

IN THE SUPREME COURT

PATRICIA D. BRACKETT,
[redacted]

Plaintiff-Appellee,

Vs.

S.C. No. _____
C.A. No. 274078
L.C. No. WCAC 04-000165

FOCUS HOPE, INC., and the
ACCIDENT FUND INSURANCE CO. OF AMERICA,

Defendant-Appellant.
_____/

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PLAINTIFF-APPELLEE'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF JURISDICTION, ORDER APPEALED AND RELIEF SOUGHT

Appellee does not concur in Appellant's "Statement of Order Appealed and Relief Sought" except as to the first paragraph on page vi. The remainder should be stricken because it is an argumentative, inaccurate and incomplete restatement of its factual summary and issues presented in other parts of its Application, and to which Appellee responds separately where appropriate. In particular, Appellee objects to what Appellant describes as "an undisputed core of facts", which is misleading and has no place in its "Statement of Order Appealed and Relief Sought."

The Defendant seeks leave to appeal the Court of Appeals Order of 10/23/07 affirming the 9/21/05 decision of the Workers' Compensation Appellate Commission (WCAC) which affirmed the Magistrate's award of benefits of 4/16/04..

Plaintiff contends the decisions below are legally correct and factually supported and requests that this Court deny leave or summarily affirm.

COUNTER STATEMENT OF ISSUES PRESENTED

I. WHETHER REMAND WAS LIMITED TO THE ISSUE OF "INTENTIONAL AND WILFUL MISCONDUCT UNDER MCL 418.305 AND DANIEL v DEPT OF CORRECTIONS, 468 MICH 34, 658 NW2d 144 (2003) AND DEFENDANT'S ARGUMENTS REGARDING PROOF OF MENTAL DISABILITY AND THE AWARD OF ATTORNEY FEES ON UNPAID MEDICAL SHOULD THEREFORE NOT BE CONSIDERED?

Plaintiff-Appellee answers: "Yes"

Defendant-Appellant answers: "No"

II. WHETHER THE COURT OF APPEALS' AFFIRMANCE OF THE WCAC'S FINDING THAT PLAINTIFF'S ACTIONS DID NOT CONSTITUTE "MISCONDUCT" WITHIN THE MEANING OF MCL 418.305 AND DANIEL, SUPRA, AND THAT BENEFITS ARE NOT PRECLUDED, IS SUPPORTED BY LAW AND EVIDENCE WHERE PLAINTIFF CLEARED WITH HER DIRECT SUPERVISOR, IN ADVANCE, HER PLANNED NON-ATTENDANCE AT THE MARTIN LUTHER KING DAY CELEBRATION, AND HER REASONS FOR IT, AFTER FOCUS HOPE ANNOUNCED THAT THE LOCATION OF ITS ANNUAL CELEBRATION, TRADITIONALLY HELD ON-SITE, WOULD FOR THE FIRST TIME BE HELD INSTEAD AT A DIFFERENT AND HIGHLY CONTROVERSIAL LOCATION, AND SHE WAS INFORMED BY HER SUPERVISOR THAT IF SHE CHOSE NOT TO ATTEND SHE WOULD BE DOCKED ONE DAY'S PAY; AND WHERE, AFTER THE FACT, SHE WAS INSTEAD DOCKED TWO DAYS PAY AND DEMOTED AND SUBJECTED TO A SERIES OF MEETINGS AND A LETTER IN WHICH SHE WAS BOTH PUBLICALLY AND PRIVATELY DENOUNCED BY THE CEO AS BEING UNTRUSTWORTHY AND UNDESERVING OF HER POSITION WITH FOCUS HOPE, EVEN THOUGH MANY OTHER CO-WORKERS ALSO DID NOT ATTEND, WITH NO SIMILAR CONSEQUENCES; AND WHERE PLAINTIFF BECAME MENTALLY AND EMOTIONALLY UNABLE TO CONTINUE WORKING AS A RESULT OF THESE EVENTS WHICH WERE ADMITTED TO BY THE CEO.

Plaintiff-Appellee answers: "Yes"

Defendant-Appellant answers: "No"

III. WHETHER THE DEFENDANT'S CLAIM THAT ATTORNEY FEES ON UNPAID MEDICAL SHOULD NOT BE AWARDED WAS NOT WITHIN THE SCOPE OF THE SUPREME COURT'S REMAND ORDER AND SHOULD NOT BE CONSIDERED, BUT IF THIS COURT, ARGUENDO, DOES NOT SO LIMIT ITS REVIEW, THEN THE COURT OF APPEALS' AFFIRMANCE OF THE WCAC'S FINDING THAT THERE WAS NO ABUSE OF DISCRETION IN THE MAGISTRATE'S AWARD OF ATTORNEY FEES ON UNPAID MEDICAL BILLS IS SUPPORTED BY EVIDENCE AND IS LEGALLY CORRECT .

Plaintiff-Appellee answers: "Yes"

Defendant-Appellant answers: "No"

COUNTER-STATEMENT OF FACTS

(Numbers in parentheses refer to pages in the trial transcript of February 18, 2003, Volume I or II. A prefix of "C" or "R" refers to the deposition transcript of Dr. Robert Cornette, Ph.D. or Dr. J. Barry Rubin, M.D. respectively.)

The Plaintiff, Patricia D. Brackett, filed an Application for Hearing on 07/15/02 alleging that she sustained mental injury and disability arising in and out of the course of her employment with the Defendant, Focus Hope, on or about 02/01/02. (I 4)

The Plaintiff is a 50 year old high school graduate with 2 ½ years of study in journalism at the University of Detroit and one year of studies at Wayne County Community College in Secretarial Science, but she has no degree from either institution. (I 16, 19)

Plaintiff testified she began her employment with the Defendant, Focus Hope, on 01/16/01. (I 27) She was very familiar with the organization before she was hired in, because it was close to her home, a part of her community and she had done volunteer work for them in the past. (I 28, 29) When she obtained her position with Defendant, she was "very happy and very proud" to be part of such a great program. (I 28-30)

Ms. Brackett testified that her job was to assist the Director of the campaign department for fundraising, Mr. David Lepper, her immediate supervisor. (I 32) Her duties were to receive, record and acknowledge donations that came into the organization. She also volunteered in the food program and participated in event planning. (I 32) Plaintiff testified that she enjoyed working at Focus Hope, took "great pride" in it, and had no problems in her job until it came time to plan the 2002 Martin Luther King Day celebration. (I 33, 34, 62)

Ms. Brackett testified that the Focus Hope celebration of Martin Luther King's birthday was annually held on the Oakman campus where she worked. During the planning for the 2002 event, however, Ms. Eleanor Josaitis, the CEO, decided she wanted it to be held in Dearborn. (I

34) Plaintiff testified that she and possibly 50 or 60 of her colleagues at work had adverse opinions regarding that location. (I 34, 35) It was a large issue among the entire team at work, and open discussions were held about it. (I 37-40) Plaintiff testified that she has celebrated Martin Luther King Day every year for 30 years. (I 36, 66) She felt, however, that the Dearborn site was "not a good fit" for her, because of its history of racism and because members of her own family had had experiences there. (I 35, 63)

Plaintiff testified she voiced her concerns about the location of the event to her immediate supervisor, Mr. David Lepper, two to three weeks prior to it taking place. (I 36, 37, 63, 64) She testified that he told her that he understood, that it was her choice and if she did not go she would be docked a day's pay. (I 37) Ms. Brackett did not attend the holiday event in Dearborn, but instead celebrated with her family. She estimated that 80 to 90 other colleagues likewise did not attend. (I 42, 43)

Approximately three days after the event, the head of Human Resources, Ms. Shirley Lightsey, called Plaintiff in to a meeting with her, Mr. Lepper and Ms. Josaitis. (I 43) In this meeting, Ms. Josaitis asked Plaintiff why she did not attend the celebration and Plaintiff explained her reasons. According to Plaintiff, Ms. Josaitis then told her that Focus Hope was all about making a change, and that Plaintiff knew when she was hired that Martin Luther King Day was a work day. (I 44) Ms. Josaitis also told her that she would be docked two days pay, instead of the one day Mr. Lepper had told her about. (I 45) Ms. Brackett testified that she told Ms. Josaitis she understood and accepted the reprimand because she knew attendance was mandatory and she did not attend. (I 54) At that point, however, Ms. Josaitis said that she can't use people like Plaintiff in her team because she can't be trusted. Plaintiff testified that Ms. Josaitis appeared angry, her voice was raised, she had an intimidating demeanor and an aggressive

posture, though she was sitting down. (I 52, 53) Plaintiff testified she was hurt because she thought she had done all she could, plus extra, for the organization and its purposes. She just didn't attend the function. (I 54)

Plaintiff testified that after this meeting, some of her job responsibilities were removed, and she was reduced from campaign assistant to filer. (I 72) Plaintiff composed and hand-delivered a memo to Mr. Josaitis that was carbon copied to Mr. Lepper, Ms. Lightsey, and a Mr. Duperron, the COO. (I 45-47; Pl. Trial Ex. 2) The memo recounted the statements made in the meeting, and expressed Plaintiff's disappointment in how Ms. Josaitis dealt with her. (I 46, 47)

Plaintiff was unsure of the date, but on either 02/01/02 or 02/02/02, she had another discussion with Ms. Josaitis. (I 48) She testified that Ms. Josaitis' assistant called and requested that Plaintiff meet her in the conference room. They were alone and after closing the door, Ms. Josaitis told Plaintiff she wanted to reiterate her position. According to Plaintiff, Ms. Josaitis was shaking her finger in her face and was very close in her space, and said: "I don't trust you. I don't see you as a colleague, and you don't deserve a check from Focus Hope." (I 48, 49, 72) Plaintiff asked if that meant she was being fired, but Ms. Josaitis just shrugged her shoulders and opened the door. (I 48)

Plaintiff testified that this expression of distrust by Ms. Josaitis "crushed" her. (I 49) She went home upset, and her husband asked her to see a doctor. (I 49, 50) She did so and has continued to see a psychologist since then. The treatment is somewhat helpful. (I 55) She has not been able, however, to return to work. (I 49-51)

On cross exam, the Plaintiff repeated that she knew when she was hired that attendance at the Martin Luther King Day celebration was required of Defendant's employees. She acknowledged that she was advised of the celebration's importance and its intent to affirm racial

equality and to help the community to heal from past wounds. (I 63) She acknowledged that she did not talk to Ms. Josaitis personally about her problem with the Dearborn location. (I 64) She did speak to her immediate supervisor, Mr. Lepper, and expected and accepted the known consequences for not attending – one day of no pay – based on her discussion with him. (I 64, 65)

Ms. Eleanor Josaitis, CEO and co-founder of Focus Hope for 36 years, testified on behalf of the Defendant. (II 6) Ms. Josaitis testified that the company's policy regarding Martin Luther King Day is that it is "extremely important" to Focus Hope, and on that day, the Focus Hope colleagues comes together to talk about the history and future of civil rights. (II 8) Ms. Josaitis recited from memory the lengthy mission statement of the organization. (II 7)

Ms. Josaitis testified that "every single" person, including Ms. Brackett, who comes to work goes through a two hour orientation in Human Resources and is told that attendance at the Martin Luther King celebration is mandatory. She agreed that anyone who has an emergency or family problem can ask Human Resources to be excused ahead of time, and that that is understood. (II 9) Ms. Josaitis testified that Plaintiff did not tell her personally, prior to the 2002 Martin Luther King celebration, that she would not be attending or that she had any problem with the location of the event. (II 8, 9) She did not, however, testify that it was either expected or required for her to do so.

Ms. Josaitis testified that she did meet with Plaintiff and Ms. Lightsey and Mr. Lepper after the event to tell Plaintiff how disappointed she was. (II 9) She testified she "was extremely calm" and did not threaten to fire Plaintiff or shake her finger in her face during that first meeting. (II 10) She was not asked, nor did she offer testimony regarding the second meeting

with Plaintiff. Contrary to Defendant's statement at page 4 of its Application, Ms. Josaitis did not testify that "only one" meeting took place.

On cross examination, Ms. Josaitis admitted that she does raise her voice to her employees, but does not yell. (II 10) She testified that the work of Focus Hope is well known and revered both locally and worldwide, that it has lofty goals and it is a privilege to be part of it. (II 11, 12) Ms. Josaitis admitted that she told Plaintiff, in the meeting with others present, that Plaintiff let her down, that she thought Plaintiff was not an ambassador of the organization, didn't believe in its mission, and told Plaintiff she had lost trust in her, that Plaintiff had "broken trust" with her. (II 11) She acknowledged that she also sent a letter to Plaintiff in which she again expressed her reduced confidence in Plaintiff's commitment to the organization based on her failure to attend the Martin Luther King celebration. (II 13, 14; Pl. Ex. No. 3)

Plaintiff testified that since her last day of work, she has no energy, has panic attacks, doesn't do anything or feel like doing anything, and feels overwhelmed all the time. (I 54, 56) She either gets too much sleep or not enough sleep, doesn't keep up with the housework, and does not socialize anymore, even though she use to attend plays, go dancing, visit people, and entertain company in her home every week. (I 56, 57, 75, 76) She has done no art work since her last day of work. She testified she has started things sporadically, but can't finish them after a few hours. (I 60)

Ms. Brackett testified she is unable to return to work at her old job, because she has problems now with short term memory and data entry functions. She testified these problems developed before she left work, because she started slipping when her emotional problems began, and couldn't keep it together. (I 74, 78, 79) She testified she did go to a temp agency for an interview, but did not pass the proficiency test and was never called back. (I 72, 73) She

testified she did much more poorly on the test than she would have done normally, that she could not stay focused, was nervous, and made a lot of errors. Previously, this was the type of test at which she would have excelled. (I 78)

Plaintiff's husband, Mr. Clinton Brackett, and her friend and neighbor, Ms. Loretta Holmes, both testified. (I 81, 91) Both described the significant changes in Plaintiff's mood, activity level and socialization after the work events surrounding the Martin Luther King Day Holiday of 2002. (I 81-94)

The medical testimony will be detailed, as necessary, within the Arguments below.

In his decision of 4/16/04, Magistrate Michael Barney held that Plaintiff established a work-related injury and disability and awarded benefits. He further held that benefits were not precluded by any "misconduct" within the meaning of MCL 418.305 and that this case is easily distinguishable from that of Daniel v Dept of Corrections, 468 Mich 34, 658 NW2d 144 (2003) (Mag Op. p. 23) The WCAC affirmed, finding "no merit" to Defendant's claim that Daniel, supra, disqualified Plaintiff from receiving benefits. (WCAC Op. p. 5)

The Court of Appeals denied Defendant's Application for Leave to Appeal for "lack of merit in the grounds presented" on 4/25/06, but upon remand by this Court on November 1, 2006, for consideration as on leave granted "in light of" Daniel, supra, the Court of Appeals affirmed the WCAC in all respects on 10/23/07. This Court did not retain jurisdiction and so Defendant again seeks leave to appeal, and Plaintiff responds herein.

ARGUMENT I

REMAND WAS LIMITED TO THE ISSUE OF "INTENTIONAL AND WILFUL MISCONDUCT" UNDER MCL 418.305 AND DANIEL v DEPT OF CORRECTIONS, 468 MICH 34 (2003) AND DEFENDANT'S ARGUMENTS REGARDING PROOF OF MENTAL DISABILITY AND THE AWARD OF ATTORNEY FEES ON UNPAID MEDICAL SHOULD NOT BE CONSIDERED

Applicable Standard of Review: The general rule is that further appeal is limited to the issues addressed in the remand order. Wemmer v National Broach & Machine Co., 199 Mich App 376, 384; 503 NW 2d 77 (1993).

The Court of Appeals denied Defendant's Application for Leave to Appeal on all the issues it raised. This Court likewise did not grant leave on any issue, but remanded for consideration of a single issue, as follows:

> "On order of the Court, the application for leave to appeal the April 28, 2006 order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted, in light of Daniel v Dep't of Corrections, 468 Mich 34 (2003)."

The sole issue in Daniel, supra, that is shared in the instant case is the applicability of MCL 418.305 to the facts presented i.e., whether "intentional and wilful misconduct" precludes benefits. Therefore, it appears the remand order intended further review of that issue only. The Court of Appeals considered the other issues raised by Defendant anyway, finding this Court's remand order did not limit their review of all issues, and affirmed the WCAC's findings as to those issues as well. Plaintiff obviously does not challenge that result, but now Defendant raises the other issues again in its new Application for Leave here. Given this Court's previously expressed intent that review be limited to the issue of Sec. 305 and Daniel, Defendant should not

now be allowed to raise other issues as well. Plaintiff's arguments in response to those other issues are nonetheless contained herein to preserve his position as to each.

ARGUMENT II

THE COURT OF APPEALS' AFFIRMANCE OF THE WCAC'S MAGISTRATE'S FINDING THAT PLAINTIFF'S ACTIONS DID NOT CONSTITUTE "MISCONDUCT" WITHIN THE MEANING OF MCL 418.305 AND DANIEL, SUPRA, AND THAT BENEFITS ARE NOT PRECLUDED, IS SUPPORTED BY LAW AND EVIDENCE WHERE PLAINTIFF CLEARED WITH HER DIRECT SUPERVISOR, IN ADVANCE, HER PLANNED NON-ATTENDANCE AT THE MARTIN LUTHER KING DAY CELEBRATION, AND HER REASONS FOR IT, AFTER FOCUS HOPE ANNOUNCED THAT THE LOCATION OF ITS ANNUAL CELEBRATION, TRADITIONALLY HELD ON-SITE, WOULD FOR THE FIRST TIME BE HELD INSTEAD AT A DIFFERENT AND HIGHLY CONTROVERSIAL LOCATION, AND SHE WAS INFORMED BY HER SUPERVISOR THAT IF SHE CHOSE NOT TO ATTEND SHE WOULD BE DOCKED ONE DAY'S PAY; AND WHERE, AFTER THE FACT, SHE WAS INSTEAD DOCKED TWO DAYS PAY AND DEMOTED AND SUBJECTED TO A SERIES OF MEETINGS AND A LETTER IN WHICH SHE WAS BOTH PUBLICALLY AND PRIVATELY DENOUNCED BY THE CEO AS BEING UNTRUSTWORTHY AND UNDESERVING OF HER POSITION WITH FOCUS HOPE, EVEN THOUGH MANY OTHER CO-WORKERS ALSO DID NOT ATTEND, WITH NO SIMILAR CONSEQUENCES; AND WHERE PLAINTIFF BECAME MENTALLY AND EMOTIONALLY UNABLE TO CONTINUE WORKING AS A RESULT OF THESE EVENTS WHICH WERE ADMITTED TO BY THE CEO.

The Defendant in the instant case claimed below that Plaintiff should not be compensated because her mental disability, although arising out of her employment, was due to her own alleged "misconduct." Defendant relied on MCL 418.305 which states:

> "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

There are two elements of the statute which must be satisfied before benefits can be barred. First, the injury must be "by reason of" misconduct. Daniel v Department of

Corrections, 468 Mich 34, 42 (2003). Second, the misconduct must be "intentional and wilful". Id. p. 44-45 Both inquiries are factual ones. Id. p. 40, 45

In Daniel, supra, the Michigan Supreme Court held that the question of whether Section 305 applies is one of fact, and that, in that particular case, the WCAC's factual conclusion that Mr. Daniel's injury was due to his own intentional and wilful misconduct was conclusive on the Court, which could not substitute its own fact-finding on the issue. Id. p. 46 Similarly, in the instant case, the WCAC's conclusion that Plaintiff's injury was not due to her own intentional and wilful misconduct, is supported and therefore conclusive on this Court.

Applying these rules of review, the Court of Appeals held:

> ". . . The magistrate found that plaintiff's decision to not attend the Martin Luther King celebration in Dearborn – a decision that resulted in her being reprimanded and subsequently suffering from mental and emotional problems – was "a far cry" from the probation officer's sexual harassment in Daniels. The WCAC agreed, opining that for defendants to claim that plaintiff was guilty of "misconduct" under the circumstances of this case was "clearly unreasonable."
>
> Although both Daniel and this case involve discipline-related disabilities, there is ample record support for the magistrate's and WCAC's mutual finding that plaintiff's pre-arranged non-attendance at the holiday event did not constitute "intentional and willful misconduct" as contemplated by MCL 418.305. Accordingly, this Court is not permitted to reject this finding to substitute its own fact-finding on the issue. Daniel, supra at page 46; see also Mudel v Great Atlantic & Pacific Tea Co., 462 Mich 691, 701; 614 NW2d 607 (2000). We agree that, unlike the repeated acts of sexual harassment in Daniel, acts the Supreme Court opined were "well beyond the realm of mere negligence or gross negligence," i.d at 45, plaintiff's conduct instead fell within the realm of those cases in which a claimant perhaps violates a workplace rule or expectation but is not precluded by § 305 from recovering benefits for a resulting injury. See, e.g., Andrews v General Motors Corp., 98 Mich App 556, 557-561; 296 NW2d 309 (1980)." (COA Slip Op., p 2)

The analysis of the Court of Appeals is sound in the record and in law, and leave to appeal is not warranted in this case.

The Magistrate in the instant case decided that Section 305 did not apply because Plaintiff's non-attendance at the Martin Luther King Day function did not satisfy the second element of the statute – that Plaintiff's conduct did not constitute "intentional and wilful misconduct". The WCAC agreed with the Magistrate's well supported conclusion, based on Daniel, supra:

> "...[T]here is absolutely no merit to defendant's claim that plaintiff's behavior should disqualify her for benefits pursuant to the doctrine set in Daniel v Department of Corrections, 468 Mich 34 (2003).
>
> For defendants to claim that plaintiff is guilty of misconduct under the circumstances of this case is clearly unreasonable." (WCAC Op. p 5)

The Court of Appeals also considered Daniel, supra, in its analysis of the facts and agreed that Plaintiff's conduct here was distinguishable from the type of intentional and willful misconduct intended to preclude benefits under the statute, and distinguishable from the conduct exhibited in Daniel.

First, it is difficult to characterize Plaintiff's refusal to attend the work function as "misconduct" at all, where, at the time of Plaintiff's hire, the Martin Luther King celebration was traditionally held on-site, but after her hire it was changed to a controversial new location, and where she previously discussed her intention not to attend and reasons with her direct supervisor, was informed of and accepted the company's policy of being docked a days pay for missing the event, and where some 80 or 90 other co-workers also missed it. Defendant's sanitized version of the facts as constituting misconduct - - a prospective employee being told to do "X", who then

doesn't do "X" (Def's Application p 7) - - fails to account for these critical facts which are very relevant to the question of whether Plaintiff's actions amount to misconduct at all.

For purposes of argument only, however, even if Plaintiff's action does constitute "misconduct", it nonetheless does not satisfy the statutory "intentional and wilful" criteria for benefit preclusion. Defendant claims that the only question is whether there is misconduct, not how bad is the misconduct. Defendant is wrong. The statute expressly, and by all prior interpretations of it, requires more than mere misconduct be proved before benefits be precluded. Only "intentional and willful" misconduct will result in that penalty.

In Daniel, the Court stated that "intentional and wilful misconduct" is to be distinguished from acts of negligence and gross negligence. Id. p. 44 Defendant here apparently suggests Plaintiff did something wrong by not discussing her intent to miss the Martin Luther King celebration with Ms. Josaitis herself in advance. But where Ms. Josaitis was not Plaintiff's direct supervisor, and Plaintiff did discuss her problem with Mr. Lepper, who was her direct supervisor, in advance of the event, and was told it was her choice, but she would be penalized one days pay, it was at the most only negligent for her not to discuss it with Ms. Josaitis as well. Defendant did not, after all, show that personal dispensation from Ms. Josaitis was required (which is yet another reason why Ms. Josaitis' personal attack would not have been reasonably expected to flow from Plaintiff's non-attendance, as will be discussed later in this Argument).

In Daniel, the Court found that Mr. Daniel's repeated acts of sexual harassment were well beyond the realm of negligence. They were of a quasi-criminal nature for which benefits are precluded. Id. p. 45 It used the definition of "quasi-criminal" set forth in Fortin v Beaver Coal Company, 217 Mich 508, 510, 187 NW 352 (1922), as conduct involving the intentional doing of something with knowledge that it is dangerous and with wanton disregard of the

consequences. The Daniel Court also noted its own prior decisions holding that coverage would be barred for actions which are of "gross and reprehensible nature" or "of a degree of moral turpitude". It stated that further definition has not been attempted because "the precise future line of demarcation will be marked out, in the traditional manner, by the case to case decision." Daniel, supra, p. 46, FN 11, quoting Crilly v Ballou, 353 Mich 303, 91 NW2d 493 (1958). Plaintiff's actions in the instant case do not fit any of the categories of "intentional and wilful misconduct" set forth in Daniel, or in any prior cases.

Cases in which a claimant's conduct was sufficiently reprehensible to bar benefits include: conduct that is a "consistent and repeated pattern over a long period of time" as in the case of Daniel, supra, whose five counts of sexual harassment were committed in that fashion, and as in Watts v Muskegon Temporary Facility, 2003 ACO #149, where the plaintiff had a long pattern of alcohol use, numerous absences and tardies leading to discipline; cases in which drug or alcohol use directly leads to the injury, as in Marcinak v Norcote Inc, 2004 ACO #240 and Bessinger v Our Lady of Good Counsel, 2002 ACO #194; cases in which the claimant knowingly places himself in a position of danger against an express prohibition, as in Larson v Lock Joint Pipe Co, 298 Mich 53, 298 NW 402 (1941) and Thi v People Mart, 2002 ACO #265, where the claimant took a running leap off a 20 foot balcony with apparent intent to kill herself. The cases of Waldbauer v Michigan Bean Co, 278 Mich 249, 270 NW 285 (1936) and Shepard v Brunswick, 30 Mich App 307, 193 NW2d 370 (1971) – both cited by Defendant – also fall into this last category. The claimants in each of those cases proceeded to work under expressly prohibited conditions in the face of known physical and even life threatening dangers, which then caused the injuries for which they sought compensation.

Cases in which a claimant's conduct was found not to have constituted wilful misconduct include: the reckless operation of a bicycle by a delivery person on an errand for his employer in Beaudry v Watkins, 191 Mich 445, 158 NW 16 (1916); refusal to observe safety rules or to wear safety devices despite shop rules requiring same as in Rayner v Sligh Furniture Company, 180 Mich 118, 146 NW 649 (1914); Clem v Chalmers Motor Co, 178 Mich 340, 144 NW 848 (1914); Michalski v Central Window Cleaning Co, 292 Mich 465, 290 NW 870 (1940), and Allen v National Twist Drill and Tool Co, 324 Mich 660, 37 NW2d 664 (1949); violation of rules which are not regularly enforced or in which a violation is acquiesced by the employer, such as in Rayner, supra; Michalski, supra, and Brink v J. W. Wells Lumbar Co, 229 Mich 35, 201 NW 222 (1924); and attempting an offer of favored work that was possibly outside the worker's medical restrictions, as in Stanton v Olga's Kitchen Inc, 2002 ACO # 236. In Andrews v General Motors Corp, 98 Mich App 556, 296 NW2d 309 (1980), the claimant's benefits were not barred even though he broke a shop rule against work slowdowns, and was injured in a fight with a coworker over that slowdown. The court there found that did not constitute the type of wilful misconduct that would preclude benefits, as it did not involve a degree of "moral turpitude" or an act of "baseness, vileness or depravity."

Given the above legal precedent, it is easy to see why the factfinders and reviewers below felt that Plaintiff's conduct in the instant case – missing a day of work after first discussing it with her direct supervisor and accepting the known consequences of missing one day's pay – did not rise to the level of "intentional and wilful misconduct" intended to bar benefits under the statute. Plaintiff's conduct was not "quasi-criminal" as it was in Fortin, supra and Daniel, supra. Her conduct was not "gross and reprehensible", nor base, vile or depraved, nor did it involve a pattern of behavior or a degree of moral turpitude that would justify preclusion of benefits. At

most, and as the Court of Appeals here recognized on remand, she violated a "rule" that was violated by as many as 80 or 90 other coworkers, who were not subject to the same consequences of character assassination that Plaintiff was subjected to, and the "violation" was first acquiesced in by her direct supervisor, Mr. Lepper. Under all the interpretations of "intentional and wilful misconduct" the courts have previously had opportunity to consider, none have barred the payment of benefits for a compensable work injury because of a minor "rule infraction" such as non-attendance at an important holiday function, prearranged with a direct supervisor.

Defendant seeks to have this Court interpret "intentional and wilful misconduct" as any voluntary action or rule infraction by a worker. In its campaign to have this Court construct the statute in a way that has been consistently rejected by the courts previously and that is contrary to the overall intent of it, Defendant wishes to engage in a battle of dueling dictionaries over the meaning of the phrase "intentional and wilful misconduct." Resort to a dictionary is unnecessary where decades of decisions and indeed Daniel, supra itself, have already interpreted its statutory meaning. This Court's remand order instructed the Court of Appeals to apply Daniel, not to craft some new definition of the statutory language.

Defendant's tactic of looking at each word of the phrase in isolation from the rest, in as many dictionaries as you need to read in order to patch together a definition that best suits your position, will not enlighten anyone as well as how that term has been traditionally applied in the context of the very statute in which it appears. What is expressly contemplated by the legislature in Section 305 (intentional and wilful misconduct), and by the Court in Daniel and its predecessors, is, just as Magistrate Barney found below, a "far cry" from Plaintiff's decision, under all the circumstances, to not attend the holiday function. (Mag Op. p. 23)

When interpreting a statute, courts must give effect to the legislature's intent and look to the object of the statute. E.g., People v Greene, 255 Mich App 426, 661 NW2d 616 (2003). Words in a statute are given meaning by their context or setting. Consumers Power Co v Public Service Comm, 460 Mich 148, 163; 596 NW2d 126 (1999). In the instant case, it is unlikely that the legislature, in enacting Section 305, intended to penalize disabled workers for any voluntary action or minor rule infraction by barring benefits, given the overall intent of the Act to provide compensation for work-related injuries, regardless of fault and where other adequate employment remedies are available to the employer to punish such infractions, such as docking the worker's pay, as was the case here.

Furthermore, the isolated dictionary definitions of the word "misconduct" selected by Defendant to promote its cause, do not aid the analysis of the legislative phrase "intentional and wilful misconduct" in the context of, and within the general intent of, the Act.

For example, Defendant relies on a definition of "misconduct" as being "improper conduct; wrong behavior" in the Random House Dictionary of the English Language, p. 1228 (2nd Ed, Unabridged, 1987). The dictionary definition is given, not in an employment context, but in a general moral context. Plaintiff's actions in the instant case were not morally improper or wrong, they were simply not what the Defendant wanted. And while Defendant may characterize her actions as wrong or improper, there are as many or more reasonable people who would not find it improper or wrong to have misgivings about the appropriateness of the unexpected and controversial new location for the holiday employment requirement in the instant case, to stand by one's personal convictions, clear your intentions with your direct supervisor and accept the known discipline for that choice. The overreaction of Ms. Josaitis, on the other hand, in making Plaintiff a workplace pariah for her choice, could easily be seen as improper or wrong.

Even if Plaintiff's non-attendance at the holiday function is viewed as "improper," or "wrong" in a general moral context, the legislature did not intend to preclude benefits for mere "misconduct," but only for misconduct that is both "intentional and wilful." Courts must give effect to every phrase, clause and word in a statute, in order to avoid rendering any part of it meaningless. One part must not be construed so as to render another part nugatory or of no effect or treat it as surplusage. E.g., People v Fosnaugh, 248 Mich App 444, 451, 639 NW2d 587 (2001); Wayne County v Wayne County Retirement Comm, 267 Mich App 230, 704 NW2d 117 (2005). When words of similar meanings are used in the same statute, it is presumed that the legislature intended to distinguish between the terms. Fosnaugh, supra, at 455.

In Sec. 305, the legislature intended to preclude benefits for what it calls "intentional and wilful misconduct." The words "intentional" and "wilful" are similar, but not synonymous. The latter includes the former, but is not confined to it. Although the two words have similar meanings, it must be presumed that, in using both, the legislature intended to distinguish between the two. Id. p. 455. Defendant's interpretation does not give effect to this legislative intent. It chooses to interpret each word as meaning the same thing – deliberate or voluntary.

As the legislature could not have intended the words "intentional" and "wilful" to have the same meaning in its use of both words, something more than an intentional act is intended by it in its inclusion of the word "wilful." Random House Dictionary Unabridged (2006) defines "intentional" as deliberate or voluntary. It defines "wilful" as intentional, but also gives a definition of "unreasonably" stubborn or headstrong. Likewise, Blacks Law Dictionary, 5th Ed, defines "wilful" as intentional, voluntary or deliberate, but also defines it as "premeditated, malicious, done with evil intent, or with bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification."

Similarly, MSN Encarta – Dictionary defines "wilful" as done deliberately, especially with the intention of harming somebody or in spite of knowing it will harm somebody. MSN Thesaurus likewise provides synonyms for the word "wilful" to include deliberate, intentional, conscious, malicious, malevolent, malign, maleficient. Plaintiff's behavior in the instant case clearly does not amount to "wilful" behavior, as distinguished from "intentional" behavior and as commonly defined and used.

The Defendant's proposed interpretation of "intentional and wilful misconduct" under Sec. 305 as being any voluntary action or rule infraction by a claimant, is simply not in accord with the meaning intended by the Legislature in choosing the requirements that the misconduct be both intentional and wilful. Had the Legislature intended such ordinary employment breaches to preclude benefits for work-related disability (in addition to whatever consequences the employer already prescribes for such breaches, such as demotion or payroll deductions), that is the language it would have chosen to use. The Legislature can change the language it did use if unhappy with the decades of accepted interpretation of it, but the Courts cannot do so, and did not do so in Daniel, supra.

The interpretations sought to be imposed by Defendant in the instant case would preclude benefits being paid for any violation of a work rule (even if cleared in advance by supervision!) involved in the suffering of an injury on the job. Such definition diminishes and defeats the "no-fault" application of the Act, taking away with one hand what it promises with the other. The overall intent of the Act to compensate work injuries, together with prior case law interpreting "intentional and wilful misconduct," demonstrates that the Magistrate's conclusion in the instant case – that Plaintiff's alleged "misconduct" did not rise to the level which would bar benefits – and the Court of Appeals affirmance of the WCAC's conclusion that Plaintiff was not guilty of

misconduct under all the circumstances, are well supported by competent evidence and legal precedent. There is therefore, no basis to grant leave to appeal.

Neither the Magistrate or the WCAC in the instant case addressed the statutory element of whether Ms. Brackett's injury was "by reason of" misconduct, nor did they need to do so in light of their conclusion that the Plaintiff's actions did not constitute "intentional and wilful misconduct". However, Defendant's attempt here on appeal to draw comparisons between the reason for the injury in Daniel and the reason for this Plaintiff's injury is skewed.

In Daniel, the Court affirmed the WCAC's conclusion that the plaintiff's injuries were "by reason of" his own misconduct, where he, a probation officer, suffered depression over being disciplined in structured, due process type proceedings for five counts of sexual harassment. The Plaintiff in the instant case did not become depressed because she was disciplined for missing a workday. Her "discipline" was, pursuant to company policy and her own direct supervisor's representation, to be docked a day's pay. She expected and accepted that discipline with no ill effect on her mental health.

Instead, Plaintiff became depressed because of the unpredictable, highly personal attack on her character by the organization's CEO, first at a meeting with other co-workers, followed by reduction of Plaintiff's responsibilities, then in a letter, and finally in another private meeting. Ms. Josaitis' personal beratement of Plaintiff had nothing to do with, nor could be reasonably expected to directly flow as "discipline" for non-attendance at a work function, particularly where the Plaintiff was previously advised of a quite different discipline, and where the evidence suggests that as many as 90 other workers missed the event with no similar consequences, and where the Plaintiff's accuser was not her direct supervisor, nor shown to have any direct

involvement with Plaintiff's work duties, even though her desk was nearby in the open floor plan.

Thus Plaintiff's injury in the instant case was not "by reason of" the discipline anticipated and rightly imposed for missing a work day, nor "by reason of" any other known or predictable consequences of her actions, as the plaintiff's injury in Daniel was "by reason of" the discipline "predictably" imposed for his criminal misconduct. Id., p. 44. Instead, Plaintiff's injury was a direct result of unprecedented personal expressions of disfavor and distrust towards her, by the very figurehead of the organization Plaintiff so admired. Thus, Section 305 could not have been applied because Plaintiff's injury was not "by reason of" any alleged "misconduct" or the corporate discipline reasonably expected to flow therefrom.

Defendant's Application again seeks to challenge the finding of mental disability, under MCL 418.301(2) and controlling case law, even though this Court's remand order did not direct further consideration of that issue on remand. This time, Defendant attempts to blend its disability argument with the issue of misconduct, but it still provides no basis for relief.

The Court of Appeals correctly affirmed the WCAC's and Magistrate's finding that Plaintiff's perception of the work events which caused her disability was "well-founded" within the meaning of the statute and governing precedent.

The compensability of mental disabilities is governed by MCL 418.301(2), which provides that:

> "Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof."

The Michigan Supreme Court recently had occasion to interpret this portion of the statute in Robertson v DaimlerChrysler Corp, 465 Mich 732, 641 NW2d 567 (2002), holding as follows:

> "We conclude that, to satisfy the mental disability requirements of the second sentence of § 301(2), a claimant must demonstrate: (a) that there has been an actual employment event leading to his disability, that is, that the event in question occurred in connection with employment and actually took place; and (b) that the claimant's perception of such actual employment event was not unfounded, that is, that such perception or apprehension was grounded in fact or reality, not in the delusion or the imagination of an impaired mind." Id. p. 752-753

The Robertson court went on to clarify that although a claimant's perception of work events will be held to an objective reasonableness standard, his or her reaction to such events is held to a subjective standard:

> "FN 10 . . . [A]lthough the perception inquiry is to be undertaken pursuant to an objective standard, we emphasize in an effort to dispel potential confusion that the 'reaction' inquiry, i.e. how a potential claimant 'reacts' to actual events of employment is to be undertaken pursuant to a subjective standard. As Justice Brickley observed [in Gardner, supra], '[a] claimant with a psychiatric disability cannot be expected react to certain events, properly perceived, in a manner entirely consistent with that of a normal healthy individual . . . while a claimant's perception of the event must be objectively well founded, that same claimant's reaction to the event can be very atypical.' Gardner, supra at 58 . . ." Robertson, supra, p. 754, FN 10.

In the instant case, the Defendant does not dispute that the events which Plaintiff claimed caused her disability actually occurred. There was a meeting with Ms. Josaitis and two other individuals in which Plaintiff was told she was untrustworthy and not a team player; there was a letter from Ms. Josaitis to Plaintiff reiterating the same thing; there was a diminishment of Plaintiff's work duties following this meeting; there was a second meeting with Ms. Josaitis in which Plaintiff was reminded yet again that she was untrustworthy and unworthy of being associated with Focus Hope. These events actually occurred, yet Defendant here argues that Plaintiff's perception of this string of insults as "harassment" is not "well-founded", but rather, is the delusion of an impaired mind as distinguished in Robertson, supra. Defendant's argument

relies in part on a carefully sanitized version of these events as merely the employer inquiring why "X" was not done when the worker did not do "X". (Defendant's Application, p. 7) The record does not support this simplistic characterization of what happened here. There was no inquiry, only repeated accusations of fault.

Defendant also claims the WCAC's handling of the Robertson issue was conclusory and without any analysis beyond its approval of the Magistrate's reasoning and Plaintiff's argument. (Mag Op p 97) The Magistrate's analysis of Plaintiff's perception of the events at work, with which the WCAC agreed, is:

> "The second question to be answered is whether Plaintiff's perception of these events was 'well founded' and 'grounded in reality.' Would the reasonable person, in other words, have perceived a lack of trust and a loss of confidence on the part of their superior toward them, a sense that their superior was disappointed in them and that the superior felt they had let the superior down? Would the reasonable person, viewed objectively, have, in light of such a chastisement by their supervisor, coupled with the taking away of some trust-based job duties after the chastisement, have reasonably feared for their job, as Ms. Brackett had testified she did? In the totality of these circumstances, I find a reasonable person, viewed objectively, would have done so; I thus find that Plaintiff's perception of the actual events of employment was well-founded in reality." (Mag. Op. p. 21)

Adoption of this legal analysis and summary of factual support by the WCAC was an entirely clear and appropriate way for it to dispose of Defendant's argument. MCL 418.861a(10); Abbey v Campbell, Wyant & Cannon Factory, (on remand), 194 Mich App 341; 486 NW2d 131 (1992). More to the point, however, the Defendant's argument about Plaintiff's perception of those events as "harassment" here was never made to the WCAC. Instead, Defendant argued below that Plaintiff's "unfounded perception" was her failure to predict that her actions would result in the character assassination to which she was subjected by one individual in the company. The Magistrate's analysis and the portion of Plaintiff's brief in

response to Defendant's argument to the WCAC which were quoted in its decision both fully addressed and defeated that argument and so the WCAC's adoption of them presents a well reasoned and supported basis for finding against Defendant on the Robertson issue.

Defendant's argument about "harassment" to this Court is brand new but still fails to provide grounds for review by this Court even if not precluded by its failure to argue it below. Defendant states that Plaintiff's "claim" is that "her meeting with Josaitis constituted 'harassment'". (Def Application p 17) First of all, Ms. Brackett's single use of the word harassment is clearly her expression of how she felt about someone getting in her face in an angry, intimidating way as Ms. Josaitis did. (I 48, 49, 52 – 53, 72) Would any reasonable person disagree with that? Not likely, but even if they did, there are just as many reasonable people who would also consider that to be harassment, and so the WCAC's conclusion that Plaintiff's perceptions were well-founded satisfies its review standard under MCL 418.861a(3) which defines "substantial evidence" as "...such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion."

Secondly, it was not just that single encounter on which Plaintiff's perceptions were based, but rather on the entire holiday aftermath of undisputed events which occurred, the totality of which would make any reasonable person feel harassed.

Was it reasonable to perceive that Ms. Josaitis distrusted Plaintiff and felt her unworthy to be part of Focus Hope as the Magistrate found and the WCAC agreed? Well, yes of course, since Ms. Josaitis actually said those things, that was a reasonable perception as Defendant agrees. It is grounded in reality and "not in the delusion or the imagination of an impaired mind." Robertson, supra p. 752-753. That was in fact Plaintiff's own perception too – that she was distrusted and thought to be unworthy by her superior. That is what she testified her

perception was. That is the very thing that so hurt and "crushed" her. (I 49) Her perception is reasonably founded because it is what Ms. Josaitis actually told her twice to her face, once in a letter, and again in her actions to decrease Plaintiff's responsibilities.

The Defendant here confuses the question of Plaintiff's perception of work events with her ability to predict them. Rather than ask whether Plaintiff's perception of Ms. Josaitis' words and actions was reasonable, Defendant asks instead whether Plaintiff should have predicted those words and actions as a consequence of her choice to not attend an important work function. That is the wrong question under Section 301(2).

Putting aside the fact that the only reasonable prediction Plaintiff had any basis to make was that she would be reprimanded and docked a day's pay, the question as posed by Defendant is simply not the issue under Section 301(2). Whether Plaintiff should have predicted a lecture attacking her loyalty and trustworthiness is not relevant to whether her perception of it is founded in fact. At most, Defendant's characterization of the issue goes to whether Plaintiff's reaction to the event was appropriate, i.e., her feelings of hurt and dismay leading to depression. As stated in Robertson, supra, and more recently in Wolf v WCAC General Motors Corp, 262 Mich App 1, 683 NW2d 714 (2004), the worker's reaction to an actual and reasonably perceived work event is not an issue in determining entitlement to benefits. The reaction may be very atypical, but here is where employers must "take employees as they find them." Robertson p. 748

ARGUMENT III

THE DEFENDANT'S CLAIM THAT ATTORNEY FEES ON UNPAID MEDICAL SHOULD NOT BE AWARDED WAS NOT WITHIN THE SCOPE OF THIS COURT'S REMAND ORDER AND SHOULD NOT BE CONSIDERED, BUT IF THIS COURT, ARGUENDO, DOES NOT SO LIMIT ITS REVIEW, THEN THE COURT OF APPEALS' AFFIRMANCE OF THE WCAC'S FINDING THAT THERE WAS NO ABUSE OF DISCRETION IN THE MAGISTRATE'S AWARD OF ATTORNEY FEES ON UNPAID MEDICAL BILLS IS SUPPORTED BY EVIDENCE AND IS LEGALLY CORRECT

The Magistrate in the instant case made the following findings regarding medical expenses:

> "I also award Plaintiff reasonable and necessary medical treatment related to her depression, including but not limited to visits with Dr. Cornette, subject to cost containment . . . I also award, per Stankovic v Kasle Steel, 2000 ACO #124 an additional attorney fee to Plaintiff counsel in the amount of 30 percent of the outstanding unpaid medical total after cost containment." (Mag. Op. p. 24)

The WCAC, correctly noting that both parties agreed that whether an award of attorney fees on medical expenses is correct is decided under an "abuse of discretion" standard (See Defendant's Brief to the WCAC p 20 -21), found no such abuse of discretion by the Magistrate in awarding a fee here:

> "We are of the firm opinion that the magistrate did not abuse his discretion in awarding an attorney fee on medical expenses to be paid by defendant. The factors that convince us that the magistrate was correct pertaining to the attorney fee issue include the fact that the defendants' human resource director referred plaintiff to Dr. Cornette and Dr. Cornette sent periodic reports to defendants regarding plaintiff's treatment and disability. The testimony of Dr. Rubin, defendants' expert, on cross-examination that the treatment rendered may have been required following plaintiff's work related stress also points toward no abuse of discretion by the magistrate in awarding attorney fees." (WCAC Op p 11)

The Court of Appeals found this disposition was proper and did not warrant reversal. (COA Slip Op. p 3)

The order for payment of reasonable medical expenses, and an attorney fee on said payments is authorized by MCL 418.315(1), which provides in the last two sentences:

> "If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the workers' compensation magistrate. The workers' compensation magistrate may prorate attorney fees at the contingency rate paid by the employee."

In Stankovic, supra, the Commission held that Section 315(1) does provide for an award of plaintiff's attorney fees on an award of medical benefits, and that the burden of such fees is on the defendant. This is a correct reading of the statute, which clearly provides that a defendant shall either reimburse plaintiff or the medical provider for medical expenses, and a fee may be ordered in either event. (Commissioner Leslie concurred in the result, but argued that the fees should be paid by the medical provider not by the defendant employer/carrier. He did not explain how to get around the problem that the Agency has no jurisdiction to order such payments by a non-party medical provider.)

In Stankovic, fees were awarded upon petition of the plaintiff after obtaining an open award of disability benefits and order to pay reasonable and related medical costs. The fees were found payable without the necessity of any additional allegations, evidence or findings of unreasonableness on the defendant's part or obviousness of entitlement on plaintiff's part.

In Scheland v Jett Box Co, 1995 ACO #242, the Commission again noted that the award of an attorney fee on medical expenses is authorized under Section 315(1), but that such an award:

> ". . . is a matter of discretion on the part of magistrate who 'may' prorate attorney fees, in the interests of justice, in cases where an employer or carrier has failed, neglected or refused to pay for medical services a claimant is clearly entitled to." Id.

In Scheland, the award of attorney fees was reversed because there was no "clear entitlement" where the medical expenses at issue were resolved by settlement, and not by an order for payment of same.

Later, the Commission in Gessner v Keeler Brass Co, 1997 ACO #548, relied on the holding in Scheland, supra, to find that there was no abuse of discretion or error in the magistrate's award of attorney fees on medical expenses of a Dr. Kremer, where said expenses were ordered to be paid as part of the general award of benefits and reasonable, related medical expenses, which defendant had failed to pay prior to the award. The Commission there noted that even the defendant's own medical expert had agreed that the treatment with Dr. Kremer was appropriate.

In the instant case, there is an order to pay medical expenses of Dr. Cornette. Under Scheland, supra, nothing more than that order is required to establish "clear entitlement". The Magistrate properly exercised the discretion given to him under Section 315(1) in awarding payment of an attorney fee on said expenses, where Defendant had failed to pay them. Said discretion was particularly appropriate where, as in Gessner, supra, Defendant's own medical expert, Dr. Rubin, testified that he agreed that treatment of Plaintiff's symptoms of depression may very well have been required following her emotional work events, even if said symptoms were not disabling (R30), and where Dr. Cornette's treatment began at the referral of Defendant's own Human Resources Director, Mr. France (C-4, 19), and where Defendant received periodic letters from Dr. Cornette regarding Plaintiff's continuing treatment and disability. (C-44, 50; Dep. Ex. #2) It is for these reasons in particular that the WCAC affirmed

the attorney fee award here. (WCAC Op. p 11) It is also these facts which render Defendant's refusal to pay the treatment expenses a neglect or breach of duty on its part.

The award of medical expenses and an attorney fee on said expenses is supported by evidence and is legally correct pursuant to statute and Court interpretations of same. Therefore, leave to appeal is not warranted.

Defendant argues that the law on this issue should be changed so as to relieve the employer/carrier of the responsibility for attorney fees on medical expenses it refuses to pay. This Court already declined to do so when it denied leave to appeal in Donoho v Wal-Mart Stores, Inc, 474 Mich 1057, 708 NW2d 444 (2006). In that case, as here, the WCAC affirmed the magistrate's award of a 30% attorney fee on medical expenses. The WCAC there noted that even Commissioner Leslie's concurrence in Stankovic, supra admitted that the Courts' and the Commission's "longstanding and consistent..." interpretation of Section 315(1) supported the discretionary award of attorney fees on medical expenses to be paid by the employer or carrier. For example, in Zeeland Hospital v VanderWal, 134 Mich App 815; 351 NW2d 853 (1984), the Court of Appeals interpreted Section 315(1) as follows:

> "Since the clause concerning attorney fees follows the clause concerning the employer's refusal to pay the employee's reasonable medical expenses, the final sentence is logically construed to require either the employer or the insurance carrier to pay a portion of ... [the] attorney's fees." Id. p 824

Defendant presents no compelling reason or legal precedent for this Court to act as legislature to change the plain meaning, consistently applied over the years, of Section 315(1) regarding attorney fees.

RELIEF REQUESTED

Wherefore, Plaintiff Patricia D. Brackett requests this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectively submitted by,

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